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Supreme Court, U.S.
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No. 98–1097

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

U-HAUL CO. OF CLEVELAND,

Petitioner,

v.

LEE KUNKLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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22pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS AGAINST GRANTING THE WRIT 4

I. This Is Not Even A Judicial Estoppel Case . 4

II. Petitioner Waived Judicial Estoppel 6

CONCLUSION 9

APPENDICES:

42 U.S.C. §422(c) A-1

20 C.F.R. §404.1592(a) A-3

EXCERPTS FROM PETITION OF U-HAUL CO. OF CLEVELAND FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, pp. 9-10 . . . . . A-5

AFFIDAVIT OF RONALD J. JAMES, (as attached to REPLY OF U-HAUL OF CLEVELAND TO KUNKLE OPPOSITION TO U-HAUL (sic) MOTION FOR RECALL OF MANDATE) . . . A-8

TABLE OF AUTHORITIES

Page(s)

CASES

Blanton v. Inco Alloys Int'l, Inc., 123 F.3d 916 (6th Cir. 1997), supplementing 108 F.3d 104 (6th Cir. 1997) 7

Cleveland v. Policy Management Systems Corp., 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998)(No. 97-1008) 4, 5, 6

Griffith v. Wal-Mart Stores, 135 F.3d 376, 382 (6th Cir. 1998), pet. for cert. filed, 66 U.S.L.W. 3800 (U.S. June 9, 1998) (No. 97-1991) 6, 7

Marrello v. Chemical Bank, 923 F.Supp. 487, 492 (S.D.N.Y. 1996) 5

STATUTES

42 U.S.C. §422(c) 5

42 U.S.C. §423(d)(2)(A) 4

42 U.S.C. §12111(8) 4

REGULATIONS

20 C.F.R. §404.1592(a) 5

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §422(c) and 20 C.F.R. §404.1592(a) are reproduced in the Appendix hereto. 42 U.S.C. §§423(d)(2)(A) and 12111(8) are reproduced in Petitioner's Appendix H to I.

STATEMENT OF THE CASE

Respondent Lee Kunkle started working for Petitioner U-Haul in 1963, and by 1990 he had worked his way up through the job of foreman, all the way up to shop manager. *See* Petitioner's App. 2a. In February 1994, however, Respondent developed lung cancer, underwent surgery, and had a lung removed. He then went into a coma, and lay on a respirator for two months. During this period, Kunkle's wife applied for disability benefits from Oxford Life. Petitioner's App. 2a. Kunkle's prognosis at that point was "extremely poor. Ninety-five percent . . . of patients in that situation die." Ct. App. Jt. App. p. 279, Tr. 25 (Dr. Lonsdorf).

Mr. Kunkle emerged from the coma. However, the cancer reappeared in August. By the end of September, Kunkle had completed the radiation treatment necessitated by this setback. Petitioner's App. 3a. In the interim, he applied for social security disability benefits (May) and started receiving them (August). Petitioner's App. 2a.

Throughout the entire period of Respondent's illness, Mr. White at U-Haul repeatedly promised him and his wife that Mr. Kunkle could return to work whenever he was able. Ct. App. Jt. App. pp. 465-66, Tr. 64-65 (White), Ct. App. Jt. App. P. 568, Tr. 427 (Mrs. Kunkle).[1]

By February, Kunkle's rehabilitation was complete and he was raring to take White up on his promise and return to

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[1] Also, the company policy allowed a one-year medical leave. Ct. App. Jt. App. pp. 451, 53, 54, Tr. 39-41 (white).

work. *See* Ct. App. Jt. App. p. 530, Tr. 290. Accordingly, Oxford Life stopped his disability benefits; and Social Security, while continuing his benefits, switched him over to its trial work program. *See* Petitioner's App. 4a.

In Kunkle's absence, Petitioner had hired Terry Mislevy to replace Respondent as shop manager. Petitioner had also William Folk as shop foreman, with the understanding that Kunkle would bump him down if and when Kunkle ever returned to work. Petitioner's App. 2a. (But see Petitioner's App. 5a: Instead of bringing Kunkle back as manager, Petitioner brought him back to the more physically demanding job of foreman in order to "set [him] up for termination." In fact, when Kunkle returned, Mislevy instructed Folk to keep his shop foreman's uniform; Folk might need it in a month.)

Thus, when Kunkle returned to work on February 15, 1995, he returned as shop foreman, albeit at his previous rate of pay. Petitioner's App. 4a. The shop foreman's job was more physical, requiring, according to the job description, lifting minimum 50 pounds. Petitioner's App. 3a.

Five weeks later, on March 20, 1995, Mr. White fired Mr. Kunkle. White articulated what he repeatedly insisted was the sole reason for the discharge: Kunkle was not physically capable of moving batteries, and he was not physically capable of moving tires, particularly "JH" tires that weighed 150 pounds. Petitioner's App. 5a.

Kunkle was dumbfounded. The foreman's job did not require, nor had anyone ever asked him to move a tire. Petitioner's App. 9-10a. True, if the job had required it, Kunkle — with only one lung — could not have lifted it singlehandedly. But each tire weighed 150 pounds. So no one could lift a tire singlehandedly! (See Ct. App. Jt. App. p. 575, Tr. 447, where Mrs. Kunkle recounted asking White

if *he* could lift a tire. When White said no, Mrs. Kunkle suggested that *he* go on disability.)

White's battery charge (!) requires more explanation. Previously, batteries had been charged with portable chargers. Under a new system, instituted while Kunkle was on medical leave, batteries would be brought to a central battery charging station. Petitioner's App. 10a.

Thus, under the new procedure, the job of job foreman entailed moving batteries. But over the five weeks Kunkle was back at work, batteries needed to be moved only once or twice. And Kunkle was able to do it, with Mr. Banks' help — it only took 10-15 minutes of Banks' time. Petitioner's App. 9-10a.

Respondent thus protested that he was physically able to perform the essential duties of his job, albeit that he needed minor accommodation to lift batteries. When his protests proved ineffective to win his job back, he filed a lawsuit alleging he was discharged in violation of the Americans with Disabilities Act and comparable Ohio law, and alleging also intentional infliction of emotional distress.

Respondent moved for summary judgment. The trial court granted the motion as to intentional infliction of emotional distress but overruled it as to Kunkle's other two claims. Petitioner's App. 13a-19a.

The case then went to trial, and the jury returned a verdict in Kunkle's favor for $950,000. The trial court overruled U-Haul's post-trial motion for judgment as a matter of law. (Petitioner's App. 35a), and U-Haul appealed to the Sixth Circuit. The Sixth Circuit affirmed (Petitioner's App.1a-12a) and subsequently denied U-Haul's petition for rehearing with suggestion for rehearing en banc. Petitioner's App. 37a.

REASONS AGAINST GRANTING THE WRIT

I. This Is Not Even A Judicial Estoppel Case

A person is "disabled" under the Social Security Act if he "cannot engage in *any* . . . kind of substantial gainful work . . ." 42 U.S.C. §423(d)(2)(A) (emphasis added). A "qualified individual with a disability" under the Americans with Disabilities Act, in contrast, is "an individual with a disability who, with or without reasonable accommodation, can perform the essential function of the employment position that such individual holds . . ." 42 U.S.C. §12111(8). The judicial estoppel issue arises in cases like *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, because it can be inconsistent for a disabled person to represent that he *can* perform the essential functions of his position, for purposes of the ADA, if he has previously sworn that he *cannot* engage in any kind of substantial gainful employment for purposes of the Social Security Disability program.

This court has granted certiorari in the *Cleveland* case. According to petitioner U-Haul, this court should also grant certiorari here because "this case presents the same issues." Petition, pp. 2-3.

In fact, however, respondent Kunkle did not make the kinds of contradictory representations about his disability that were at issue in *Cleveland*. Therefore this Court should not grant certiorari here.

Lee Kunkle's wife applied for private disability insurance benefits on Lee's behalf in February of 1994; Lee himself was lying in a two-month long coma after losing one lung to lung cancer. Those benefits began in March of 1994. In July, Kunkle's application for Social Security disability benefits was approved. In August, his cancer recurred, and he started radiation treatments. He continued receiving both

private disability and Social Security disability benefit until mid-February, 1995, when he recovered to the degree that he could return to work. At that point, his private disability insurance stopped; and while his Social Security benefits continued, they did so under Social Security's "trial work" program.

Carolyn Cleveland's case was very different. She applied for Social Security disability benefits representing that she was totally disabled as of January 7, 1994. Even when she returned to work in April of 1994, she never withdrew her application or otherwise indicated to the Social Security Administration (SSA) that she was anything other than totally disabled and unable to work. Under those circumstances, the Fifth Circuit determined that she was estopped from asserting that she was a qualified individual with a disability under the ADA when she was fired in July of 1994. *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997).

What distinguishes Kunkle's case from Cleveland's is the fact that once Kunkle recovered to the point in February 1995, that he could return to work, he told the SSA so. The SSA itself then switched Kunkle to the "trial work" program under 42 U.S.C. §422(c) and 20 C.F.R. §404.1592(a).

Receipt of benefits under the trial work program — unlike receipt of Social Security disability benefits otherwise — does *not* require an individual to be unable to work in order to qualify as disabled (*Cleveland*, *supra*, at 518); and it would materially threaten the "policy concerns and implications" of the trial work program to bar a worker who receives benefits under this program from seeking the protection of the ADA. *See Marrello v. Chemical Bank*, 923 F. Supp. 487, 492 (S.D.N.Y. 1996). The representations that individual makes to qualify under the trial work program — disabled, but able

to work — thus do not, and should not, estop him from claiming he is a "qualified individual with a disability" under the ADA. *See also, e.g., Griffin v. Wal-Mart Stores*, 135 F. 3d 376, 382 (6th Cir. 1998) (also distinguishing the trial work program).

This is thus not a case like *Cleveland*. Ms. Cleveland's representations of total inability to work on account of her disability, made to the SSA, were totally at odds with her representations, made under the ADA, that she was able to work despite her disability. These inconsistencies in Ms. Cleveland's representations made *Cleveland* ripe for a grant of Certiorari, so this court can refine the role judicial estoppel should play in ADA eligibility. But there are no analogous inconsistencies here. Therefore, whereas it made sense to grant certiorari in *Cleveland*, it would add nothing to the debate over judicial estoppel's role in ADA eligibility to grant certiorari in this case.

II. Petitioner Waived Judicial Estoppel

U-Haul is petitioning for certiorari on the judicial estoppel issue. In fact, however, Petitioner waived this issue during oral argument before the Sixth Circuit.

In the course of upholding the lower court's denial of judgment as a matter of law, the Sixth Circuit recounted this waiver as follows:

> "[U]Haul is not entitled to judgment as a matter of law, and the district court properly denied its post-judgment motion for the same.
>
> In so holding, we note that U-Haul initially asserted that Kunkle should have been judicially estopped from claiming that he is "otherwise qualified" in light of representations that he and

> his physicians made to the SSA and Oxford [Insurance Company] regarding his physical condition . . . At oral argument, however, U-Haul conceded that its argument concerning the applicability of judicial estoppel in this context has been foreclosed by this court's decisions in *Blanton v. Inco Alloys Int'l, Inc.*, 123 F.3d 916 (6th Cir. 1997), Supplementing 108 F. 3d 104 (6th Cir. 1997), and *Griffith v. Wal-Mart Stores, Inc.*, 135 F. 3d 376 (6th Cir. 1998). Accordingiy, we need not address the merits of U-Haul's argument that Kunkle should be judicially estopped from asserting that he is "otherwise qualified" within the meaning of the ADA."

U-Haul should not be permitted to resurrect, here upon petition for certiorari, an issue it waived below.

U-Haul argues, however, that it waived only judicial estoppel *per se*, and that it did not intend to waive its argument that Kunkel's representations of disability to the SSA was evidence entitling U-Haul to judgment as a matter of law. But even if judicial estoppel could be subdivided into two arguments (i.e., judicial estoppel *per se vs.* representations of disability entitling U-Haul to judgment as a matter of law) so that a waiver somehow applied to one argument but not the other, the supposed distinctions between the two arguments are distinctions without a difference in this case. For it is clear that the Sixth Circuit did factor in Kunkle's representations of disability, along with all the other

evidence, when it considered whether U-Haul was entitled to judgment as a matter of law.[2]

Judgment as a matter of law "may be rendered only when no reasonable juror could find in favor of the non-moving party." *See* Petitioner's App., 7a. Here, in contrast, a reasonable juror *could* find in Kunkle's favor. On one hand, U-Haul presented evidence of Kunkle's representations to the SSA to establish that Kunkle could not have been a qualified individual under the ADA. But on the other hand, Kunkle countered this evidence with evidence establishing that Kunkle was a qualified individual under the ADA.

A reasonable juror was entitled to conclude from Kunkle's evidence, and despite U-Haul's evidence, that Kunkle was indeed "perfectly capable of performing" despite having a "disability" under the ADA. Petitioner's App. 10a, 9a. And therefore, the trial court and the Sixth Circuit properly overruled U-Haul's motion for judgment as a matter of law.

Thus there was no misinterpretation of the scope of petitioner's waiver which justifies relief here.

To the contrary — U-Haul waived the issue; U-Haul intended to waive the issue; the panel interpreted the scope of the waiver correctly; and the court, in denying U-Haul's

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[2] See the Sixth Circuit's Order of November 24, 1998, denying U-Haul's petition for rehearing, Petitioner's App. 37a. U-Haul had petitioned for rehearing on the grounds that the Sixth Circuit had misinterpreted the scope of its waiver, i.e., that U-Haul meant only to waive judicial estoppel *per se* and not whether Kunkle's prior representations of disability entitled U-Haul to judgment as a matter of law. The Sixth Circuit denied the motion, "conclud(ing) that the issues raised on the petition were fully considered upon the original submission and decision of the case."

Petitioner for Rehearing, impliedly agreed that the panel had interpreted the scope of the waiver correctly. Accordingly, the issue of judicial estoppel must be deemed waived here upon petition for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny U-Haul's Petition for a Writ of Certiorari.

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